

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

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CRIMINAL

v.

TONY SOTO

NO. 06-328-2

MEMORANDUM

Padova, J.

March 8, 2007

Defendant Tony Soto was convicted following a jury trial on the four counts of aiding and abetting the making of a false statement to a federal firearms dealer, in violation of 18 U.S.C. § 924(a)(1)(A), and 18 U.S.C. § 2. Presently before the Court is Defendant's motion for acquittal based on insufficiency of the evidence. For the reasons that follow the motion is denied.

I. LEGAL STANDARD

Fed. R. Crim. P. 29(c)(1) provides that a defendant may move for a judgment of acquittal within seven days after the guilty verdict. The United States Court of Appeals for the Third Circuit has held that,

In ruling on a motion for judgment of acquittal made pursuant to Fed. R. Crim. P. 29, a district court must "review the record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilty beyond a reasonable doubt based on the available evidence." . . . A finding of insufficiency should be "confined to cases where the prosecution's failure is clear." . . . Courts must be ever vigilant in the context of Fed. R. Crim. P. 29 not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or

by substituting its judgment for that of the jury.

United States v. Brodie, 403 F.3d 123, 133 (3d Cir. 2005) (internal citations omitted); see also Jackson v. Virginia, 443 U.S. 307, 319 (1979) (“[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”).

II. DISCUSSION

Section 924(a)(1)(A) of Title 18 U.S.C. provides that whoever “knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter” shall be fined or imprisoned. The parties agree that the elements of aiding and abetting the making of a false statement to a federal firearms dealer are: (1) that the defendant knowingly aided and abetted and willfully caused another person to falsely represent that he or she was the actual buyer of a firearm, when, in fact, the defendant knew that this representation was false; and (2) that the false statement was with respect to information required to be kept in the records of a federal firearms dealer. See 18 U.S.C. § 924(a)(1)(A); 18 U.S.C. § 2; United States v. Cartwright, 359 F.3d 281, 287 (3d Cir. 2004) (holding that a conviction on aiding and abetting requires that another committed the substantive offense and that the one charged with aiding and abetting knew of the substantive-offense commission and acted with the intent to facilitate it). Defendant argues that the Government failed to prove the substantive false statement offenses, failed to prove Soto’s knowledge that the substantive offenses were being committed, and failed to prove that Soto acted with intent to facilitate the substantive offenses.

A. The trial record

The four counts involved firearms purchases on December 2, 2004, March 29, 2005, April

1, 2005, and April 6, 2005. At trial, the Government called ATF investigator Joe Weaver, who testified that a gun dealer must have a federal license. (11/6/2006 N.T. at 4-5.) To purchase a firearm, a person must complete ATF Form 4473 attesting that they are the “actual buyer” of the firearm. (11/6/2006 N.T. at 5.) The actual buyer is the person who is actually going to take possession of the firearm. (Id.) One who buys a firearm for another person is not the actual buyer. (11/6/2006 N.T. at 5-6.) Weaver testified that Delia’s Gun Shop is an active federal firearms licensee and, as such, is required to have every customer fill out a Form 4473, and obtain actual identification and biographical information about the actual purchaser of a gun. (11/6/2006 N.T. at 6.)

Fred Delia testified that he is the owner of Delia’s Gun Shop and a federal firearms licensee. (11/6/2006 N.T. at 8.) When a customer makes a purchase of a firearm, he must get a copy of a Pennsylvania issued ID and record the information on a Form 4473. (11/6/2006 N.T. at 8-9.) Question A 1 on the Form states: “Are you the actual buyer of the firearms listed on this form?” (11/6/2006 N.T. at 10.) Delia testified that under the law he is required to keep the Form in his records for twenty years. (11/6/2006 N.T. at 13.) Delia produced the Forms 4473 at issue in this case. (11/6/2006 N.T. at 14.) The transactions involving Defendant Soto aroused Delia’s suspicion because Soto, Theresa Brown and the juvenile that accompanied them arrived in a taxi cab; and Brown, the person who signed as the actual purchaser, did not appear to know what she was doing as far as the guns were concerned. (11/6/2006 N.T. at 15.)

Government Ex. 1, a Form 4473 dated December 2, 2004, was completed for the sale of a Mossberg 500 shotgun by Theresa Brown who certified that she was the actual buyer of the firearm. (11/6/2006 N.T. at 16.) Government Ex. 3, a Form 4473 dated March 29, 2005, was completed for

the sale of a HighPoint Model 995 9mm rifle by Theresa Brown who certified that she was the actual buyer of the firearm. (11/6/2006 N.T. at 22.) Government Ex. 6, a Form 4473 dated April 1, 2005, was completed for the sale of a second HighPoint 995 by Theresa Brown, who certified that she was the actual buyer of the firearm. (11/6/2006 N.T. at 25.) Government Ex. 9, a Form 4473 dated April 6, 2005, was completed for the sale of a Kel-Tek 223 caliber rifle by Theresa Brown. (11/6/2006 N.T. at 27.) Brown certified that she was the actual buyer. (11/6/2006 N.T. at 31.)

Prior to the April 6 sale, Delia had contacted the ATF because he was suspicious about Brown. He called Philadelphia Police Officer Paul Sawicki and told him that Brown was about to come back in again to purchase another weapon. (11/6/2006 N.T. at 28.) He knew Brown was coming in because he received a phone call from a male inquiring if Delia had a particular gun in stock. (11/6/2006 N.T. at 27-28.) ATF set up surveillance at the shop and arrested Brown, Soto and the male juvenile when they exited the shop after buying the firearm. (11/6/2006 N.T. at 29.) Brown also purchased two magazines for the Kel-Tek rifle and six boxes of 223 caliber ammunition. (11/6/2006 N.T. at 33.)

Officer Sawicki testified that in April 2005 he was assigned to work with ATF. (11/6/2006 N.T. at 35.) He testified that he spoke with Delia, whom he knew to be a federal firearms dealer, in early April about a black female who had recently purchased some rifles. He got a photocopy of Brown's driver's license photo and set up an ATF task force to begin surveillance the next day at Delia's. (11/6/2006 N.T. at 36.) Sawicki surveilled Brown's home. He observed her leave her home, get into a taxi cab occupied by two males, and drive to Delia's (11/6/2006 N.T. at 37.) Sawicki testified that Delia's has a one-way mirror through which another officer, Jerry Gallagher, videotaped the activity that took place. (11/6/2006 N.T. at 38.)

Next, ATF Agent Cam Conklin testified that he was outside Delia's and observed Brown, Soto and the juvenile exit the taxi and go into the store. He later observed them leave and get on a city bus. (11/6/2006 N.T. at 41.) He followed the bus until they got off, then confronted the individuals. (11/6/2006 N.T. at 42.) Brown was carrying a bag containing the magazines and ammunition; the juvenile was carrying the firearm. (Id.) All three were taken to the ATF office for questioning, where Brown made a statement. (11/6/2006 N.T. at 44.)

Sergeant Walter Livingston of the Philadelphia Police Department testified that he was also part of the surveillance at Delia's and sat in on the interview of Defendant Soto that was conducted by his partner, ATF Special Agent Joseph Ruda. (11/6/2006 N.T. at 47.) After administering Miranda warnings, Soto signed a written waiver of his right to remain silent and to have counsel present. (11/6/2006 N.T. at 47-48.) Livingston testified that Soto admitted that he escorted Brown to Delia's "to protect her." (11/6/2006 N.T. at 50.) He was to make \$100 for his efforts. (Id.) He admitted that he was the person who had called Delia's earlier to ask about the gun. (11/6/2006 N.T. at 51.) He stated that it was the juvenile's idea to buy the guns to resell to drug dealers named Jay and Spank. (Id.) Soto provided descriptions of the two drug dealers and their cell phone numbers to Livingston. (Id.) He admitted that the first gun they purchased from Delia's was for Spank, that he (Soto) was paid \$100 and that Brown was paid \$250 for the purchase. (11/6/2006 N.T. at 52.) The second gun was for Jay; Soto was paid \$100 and Brown was paid \$250 or \$300 for the purchase. (11/6/2006 N.T. at 53.) Soto stated that Brown was paid more because the guns were in her name. (Id.) The money to buy the guns was supplied by the juvenile. (Id.)

Philadelphia Police Detective John Logan testified that he conducted a proffer session with Soto in which the Defendant gave him information regarding a house in Philadelphia with a secret

compartment in the basement containing the Mossberg shotgun, an AK-47 assault rifle and a MAC-10 machine gun. (11/7/2006 N.T. at 9.) He obtained a search warrant for the property and recovered the Mossberg shotgun. (Id.) The firearm was loaded with four shells when it was recovered. (11/7/2006 N.T. at 10-11.)

The parties stipulated that, if called to testify, ATF Special Agent Gerard Gallagher would testify that he was the agent in the back room at Delia's and took a videotape of Defendant, Brown and the juvenile inside the gun shop. The video was then played for the jury showing Brown, Soto and the juvenile inside Delia's purchasing the firearm. (11/7/2006 N.T. at 12.)

Theresa Brown testified that she filled out the Forms 4473 and lied when she told Delia that she was the actual purchaser of the firearms. (11/7/2006 N.T. at 17.) She stated that the actual purchaser was Defendant Soto. (Id.) She identified her signature on the Forms, certifying that she was the actual purchaser. (11/7/2006 N.T. at 19-23).

B. The record-keeping requirement

Soto argues that the Government failed to prove the substantive offense of a violation of 18 U.S.C. § 924(a)(1)(A) because it did not present evidence regarding the record-keeping requirement. Specifically, he argues that the Government did not present evidence to the jury reflecting that the keeping of "actual buyer" information was required by any section or sub-section of Chapter 44 of Title 18. The record shows that this argument has no merit. Investigator Weaver testified that: (1) a gun dealer must have a federal license; (2) to purchase a firearm, a person must complete ATF Form 4473 attesting that they are the "actual buyer" of the firearm; (3) the actual buyer is the person who is actually going to take possession of the firearm; (4) one who buys a firearm for another person is not the actual buyer; and (5) Delia's Gun Shop is an active federal firearms licensee and,

as such, is required to have every customer fill out a Form 4473, and obtain actual identification and biographical information about the actual purchaser of a gun. In addition, Fred Delia testified that he was required, as a federal firearms dealer, to maintain Forms 4473 in his records for twenty years.

Soto appears to argue, without any citation to authority, that the Government was required to establish as fact that the “actual purchaser” statement was information required by Chapter 44. Whether the actual purchaser is information required to be kept by a licensee is a legal question, not a fact that had to be proven to the jury. Several provisions in Chapter 44 legally require licensed firearms dealers to keep records containing information about the identity of individuals who buy firearms. These provisions include 18 U.S.C. §§ 923(g), 922(b)(5), and 922(s)(3). Section 923(g) sets forth the general requirement that “[e]ach . . . licensed dealer shall maintain . . . records of . . . sale [] or other disposition of firearms at his place of business.” 18 U.S.C. § 923(g)(1)(A). Under § 922(b)(5), these records must contain, at a minimum, “the name, age, and place of residence” of any individual who purchases a firearm from a licensed dealer. In addition, prior to selling a handgun to an individual “transferee,” a licensed dealer must, under § 922(s)(3), obtain a statement from that transferee which contains “the name, address, and date of birth appearing on a valid identification document . . . of the transferee and a description of the identification used.” 18 U.S.C. § 922(s)(3). Further, the dealer must verify the transferee’s identity by examining the identification document described in the transferee’s statement. “Thus, licensed firearms dealers are legally required to keep information about the identity of firearms buyers in their records. As a result, false statements or representations relating to this information are prohibited under § 924(a)(1)(A).” United States v. Nelson, 221 F.3d 1206, 1209 (11th Cir. 2000); see also 27 CFR § 178.124(a) (containing the legal requirement that a federal firearms dealer record each sale on Form 4473, which

requires information about the “transferee” of the firearm); 27 CFR 178.124(b) (requiring that the dealer retain each Form 4473 in its records).¹ The Government was not required to prove to the jury that the actual purchaser was information required by Chapter 44 to be kept in the records of a federal firearms dealer. Once the Government proved beyond a reasonable doubt that the actual purchaser statement was in fact false, a reasonable jury could conclude beyond a reasonable doubt that there was a false statement with respect to the information required to be kept under Chapter 44.

C. Soto’s knowledge that the “actual buyer” statement was false, and intent to facilitate the substantive offense

Defendant next argues that, to meet its burden on the scienter requirement for aiding and abetting, the Government had to prove that Soto had knowledge of the false statements charged in the indictment. He argues there was no evidence that he read the firearms purchase form that Brown

¹We note, in addition, that we instructed the jury, with no objection from the Defendant, that:

You are instructed that a licensed firearms dealer is required by federal regulation, 27 CFR § 478.124(a) and (c) to record each gun sale on an ATF Form 4473, which requires the name, address, and other information concerning the “transferee,” the person who is purchasing the gun.

You are further instructed that a licensed firearms dealer is required by federal regulation, 27 CFR § 478.124(b), to retain each Form 4473 obtained in the course of transferring custody of firearms.

(11/7/2006 N.T. at 57.) Rule 30 of the Federal Rules of Criminal Procedure provides the standard for preserving an objection to a jury instruction:

A party who objects to any portion of the instruction or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. . . . Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b) [defining plain error analysis].

Fed. R. Crim. P. 30(d). Under the statute and regulations, a false statement regarding the transferee is a false statement with respect to the information required by Chapter 44 to be kept in the records of a federal firearms dealer. As Soto raised no objection to this point of law, he failed to preserve the legal issue. Our instructing the jury on the legal requirements contained in 27 CFR § 478.124(a) and (b) was not plain error.

signed, no evidence that he discussed the form, and no evidence that Brown made him aware that the form called for buyers to certify they are the actual buyer. He also argues that there was no evidence to show that he acted with the intent to facilitate the making of the false statement. The record demonstrates that these argument are meritless.

Theresa Brown testified that she filled out the Forms 4473 and lied when she told Delia that she was the actual purchaser of the firearms because the actual purchaser was Defendant Soto. Soto admitted in his statement that he aided and abetted Brown's false statements when he escorted her to Delia's "to protect her" and made \$100 for his efforts on each transaction. He also admitted that he aided and abetted her when he called Delia's to ask about the gun. His knowledge of the falsity of the statement that Brown was the actual owner was demonstrated by the evidence that he knew the gun was being purchased to resell it to drug dealers. Soto admitted that the first gun purchased from Delia's was for Spank, and the second gun was for Jay. He also admitted that the money to buy the guns was supplied by the juvenile. Finally, Soto was able to identify the location of the one gun in a secret compartment in a Philadelphia house. The evidence clearly demonstrated Soto's knowledge that Brown's statement, that she was the actual purchaser, was false. The evidence also clearly demonstrated Soto's intent to facilitate the making of the false statement.

Accordingly, Defendant's motion for acquittal is denied. An appropriate order follows.

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ORDER

AND NOW, this 8th day of March 2007, upon consideration of Defendant's Motion for Judgment of Acquittal (Docket Entry # 46), **IT IS HEREBY ORDERED** that said motion is **DENIED**.

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.